

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION OF)	
JOHN NICHOLS REQUESTING THE PUBLIC)	
SERVICE COMMISSION TO OPEN A DOCKET)	PSC DOCKET NO. 18-1097
TO REVIEW THE QUALIFIED FUEL CELL)	
PROVIDER TARIFF)	
(FILED SEPTEMBER 21, 2018))	

**JOINT MOTION OF THE DELAWARE PUBLIC SERVICE COMMISSION STAFF
AND THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE
TO DISMISS THE PETITION OF JOHN NICHOLS TO OPEN A
DOCKET TO REVIEW THE QUALIFIED FUEL CELL PROVIDER TARIFF**

The Delaware Public Service Commission Staff (“Staff”) and the Delaware Division of the Public Advocate (“DPA”) hereby move the Delaware Public Service Commission (the “Commission”) for an order dismissing a petition (“Petition”) filed by Mr. John Nichols (“Mr. Nichols”). The Petition requests the Commission to open a docket to review the Qualified Fuel Cell Provider tariff (the “Tariff”) of Delmarva Power & Light Company (“Delmarva” or the “Company”). In support of this Motion, Staff and the DPA state as follows:

BACKGROUND

1. On September 21, 2018, Mr. Nichols filed the Petition (apparently as an attempt to prod the Commission into taking action to mitigate the allegedly adverse effects of the Tariff). The Petition sets forth how the Tariff came into effect and the parties that were involved. It also describes the General Assembly’s codification of the Tariff terms; the contract between Delmarva and Bloom Energy, Inc. (“Bloom”); the Commission’s approval of the Tariff in 2011; and the written public comments about the Tariff before its approval. The Petition also explains the detrimental results of the Tariff, including its high costs, its lack of environmental benefits, its failure to bring jobs to Delaware, and its failure to attain Bloom’s stated mission. Finally, the

Petition sets forth suggested possible options for Delmarva and Bloom to pursue given the deleterious effects of the Tariff.

2. Even if all of the facts that Mr. Nichols alleges in the Petition are true, the General Assembly has not given the Commission the authority to change the Tariff under any circumstances. Although Delmarva is a regulated utility and the Commission has legal authority over its operations, the Commission has no legal authority to change the role of Delmarva as merely the agent that collects and disburses the adjustable nonbypassable charges of the Tariff. Nor does the Commission have the authority to alter the terms of the Tariff. Delaware law dictates that only two parties (Bloom and Delmarva) may amend the terms of the Tariff—and the Commission is not one of those parties. Delaware law further prevents the Commission from ever taking any action with respect to the terms of the Bloom Project that is inconsistent with the statutorily-required provisions. Finally, Delaware law provides that if the two authorized parties who may change the terms of the Tariff have a dispute regarding the Tariff's terms, the original jurisdiction for that dispute would be in a Delaware court and not as a matter before the Commission. Thus, the Commission must dismiss the Petition with prejudice.

3. Moreover, even if the Commission did have authority to do something about the Tariff, exercising such authority would trigger a statutory acceleration provision that makes Delmarva ratepayers *immediately* responsible for paying Bloom another approximately \$400 million. Residential ratepayers would have to pay an approximate \$700 as soon as the Commission took action contrary to the Tariff provisions; that result is unacceptable.¹

¹ This is a rough estimate, not an exact number.

ARGUMENT

A. The Commission Lacks the Legal Authority to Change the Tariff

4. In the Petition, Mr. Nichols requests that the Commission review the approved Tariff, the "resulting burden" on Delmarva ratepayers, and options to mitigate the alleged burden. He also concludes in the Petition that even if Delmarva and Bloom have no legal obligation to revisit the Tariff, those parties may be willing to do so. He then suggests some options for those two parties to pursue. Based on the Petition's concluding language alone, Mr. Nichols seems to acknowledge that the Commission may be powerless to revisit any issues stemming from the Tariff. And he is correct.

5. Section 364(d)(5) of the Amendments specifically requires the Commission to either approve or reject Delmarva's tariff filings in whole *as proposed, without alteration or the imposition of any condition or conditions*:

(5) Once approved by the Commission, *such tariff provisions cannot be altered, nor may approval be repealed or modified, without the agreement of both the commission-regulated electric company and the qualified fuel cell provider project* except that revisions to tariffs may be proposed by the commission-regulated electric company alone where:

- a. Such revisions have no adverse effect on the qualified fuel cell provider project, and
- b. Such revisions are for the purpose of complying with subsection (c) of this section.²

(Emphasis added).

6. If the Commission approved the Tariff, Bloom became entitled to a "revenue property" for the amounts to which it was due for acting as a "qualified fuel cell provider project" ("QFCPP") and for the amounts due to it as collected by Delmarva on its behalf. The

² 26 Del. C. §364(d)(5). 26 Del. C. §364(c) is inapplicable to this Petition.

revenue property continuously exists until the end of the "term of service" of the QFCPP, i.e., until Bloom's contract with Delmarva terminates in 2033.³

7. Additionally, any requirement in Delaware law or in the approved Tariff that requires the Commission to take action on a QFCPP binds the Commission forever, and the Commission cannot rescind, alter, or amend such law or the approved tariff by means of a later order.⁴

8. Delaware law further mandates that Bloom must recover the full amounts that will be due for operating as a QFCPP.⁵ Finally, even if the General Assembly later changes any sections in Title 26, ch. 1, subch. III-A, Bloom will still recover all amounts approved in the Tariff.⁶

9. The goal of statutory construction is to give effect to the General Assembly's intent as expressed in the language used.⁷ The Delaware Supreme Court instructs that when a statute is unambiguous, there is no room for interpretation and the statute's plain meaning controls;⁸ that courts "ascribe a purpose to the General Assembly's use of specific language ...;"⁹ that courts "have no authority to vary the terms of a statute of clear meaning or ignore mandatory provisions;"¹⁰ and that courts cannot "engraft upon a statute language which has been clearly

³ *Id.* §364(f).

⁴ *Id.* §364(g).

⁵ *Id.* §364(d)(1) (the Commission must adopt tariff provisions that will protect a QFCPP so that the QFCPP may recover all amounts approved in the tariff).

⁶ *Id.* (the Commission must adopt tariff provisions to protect a QFCPP from any future changes in Delaware law that would prevent the QFCPP from recovering all amounts approved in the tariff for each MWH of output produced by the QFCPP).

⁷ *Zambrana v. State*, 118 A.3d 775, 776 (Del. 2015); *Terex Corp. v. Southern Track & Pump, Inc.*, 117 A.2d 537, 543 (Del. 2015); *Dambro v. Meyer*, 974 A.2d 121, 129-30 (Del. 2009).

⁸ *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp.*, 36 A.3d 336, 342-43 (Del. 2012).

⁹ *Zambrana*, *supra* at 776.

¹⁰ *Id.*

excluded therefrom by the Legislature;”¹¹ Furthermore, “it is well-established that administrative agencies ... derive their powers and authority *solely* from the statute creating such agencies and which define their powers and authority.”¹² Thus, the Commission can only look to the Public Utilities Act to determine its authority. And it is clear that Section 364(d)(5) of the Public Utilities Act gives the Commission no authority to reconsider its approval of the Tariff.

10. Once the Commission approved the Tariff on October 18, 2011, it no longer had any legal authority to propose or order any modifications to the Tariff. In its Findings, Opinion and Order No. 8079 approving the Tariff, the Commission recognized that Delaware law stripped the Commission of any right to propose modifications to the Tariff even if the Commission were to exercise its authority to approve or disapprove Delmarva’s application.¹³ The Commission also noted in the Order that once it approved the Tariff, the Tariff’s provisions—and the obligations of Delmarva’s ratepayers under the Tariff—became “unalterable, except upon joint application of Delmarva and Bloom Energy.”¹⁴

11. To cement the General Assembly’s clear intent, it included other statutory provisions to reinforce the Commission’s inability to take any action to eliminate Bloom’s statutorily created revenue property: (1) the Tariff provisions dealing with disbursements and costs from the QFCPP and recovery of costs are irrevocable;¹⁵ (2) the Commission cannot rescind, alter, amend or [in a similar fashion change] the tariff provisions; revalue or revise the disbursements or costs; determine that the disbursements or costs are unjust or unreasonable; or

¹¹*Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (quoting *In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993)).

¹²*Office of the Commissioner, Delaware Alcoholic Beverage Control v. Appeals Commission, Delaware Alcoholic Beverage Control*, 116 A.3d 1221, 1227 (Del. 2015), quoting *Wilmington Vitamin & Cosmetic Corp. v. Tigue*, 183 A.2d 731, 740 (Del. Super. Ct. 1962) (emphasis in original).

¹³*In the Matter of the Application of Delmarva Power & Light Company for Approval of Qualified Fuel Cell Provider Project Tariffs* (PSC Dec. 1, 2011) (“Order No. 8079”) at ¶41.

¹⁴ *Id.*

¹⁵ 26 Del. C. § 364(h).

in any way reduce or impair the value of Bloom's revenue property, directly or indirectly, by taking Bloom's disbursements or costs into consideration when setting rates for Delmarva.¹⁶ The Commission also cannot reduce, impair, postpone, or terminate the disbursements, amount of revenues, or costs for the QFCPP;¹⁷ and (3) the State of Delaware has pledged—in the Delaware Code—that it will not limit or alter Bloom's revenue property until the obligations are met and fully discharged, unless "adequate provision" is made by law for the full recovery [of the revenue property] by Bloom and Delmarva.¹⁸

12. The intent of the General Assembly could not be clearer: the Commission has no legal authority to alter the Tariff. Therefore, it cannot grant Mr. Nichols' requested relief, and his Petition must be dismissed.

B. Only Delmarva and Bloom Can Change the Provisions of the Tariff

13. Once the Commission approved the Tariff, the Commission had no authority (and continues to have no authority) to alter, repeal, or modify the Tariff or any of its provisions without the agreement of both Delmarva and Bloom.¹⁹ Thus, in addition to the clear intent of the General Assembly to prohibit the Commission from altering any of the provisions of the Tariff, Delaware law also provides that both Delmarva and Bloom must be a party to any agreement that alters such Tariff. The Commission has no regulatory authority over Bloom and hence cannot order Bloom to act in any particular way, including in a way that would negatively affect Bloom's revenue property. Nor can the Commission order Delmarva—even though it is a

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 26 *Del. C.* § 364(d)(5) provides, in pertinent part, that "[o]nce approved by the Commission, such tariff provisions cannot be altered, nor may approval be repealed or modified, without the agreement of both [Delmarva] and [Bloom] except that revisions to tariffs may be proposed by [Delmarva] alone where: a. Such revisions have no adverse effect on the qualified fuel cell provider project, and b. Such revisions are for the purpose of complying with subsection (c) of this section."

regulated utility—to alter the provisions of the Tariff or to enter into any agreement to alter the terms of the Agreement. The request of the Petition is therefore beyond the scope of the Commission’s authority.

C. Even If the Commission Could Grant Mr. Nichols’ Request and Terminate the Bloom Tariff, It Should Decline to Do So.

14. Even if the Commission had the authority to terminate the Bloom Tariff, it should decline to do so. Terminating the Tariff before the end of its statutorily created life will not relieve Delmarva ratepayers of the burden of paying Bloom any more money. Rather, as we have previously noted, it will *accelerate* the total amount due, so that ratepayers will *immediately* be on the hook to Bloom for approximately \$400 million²⁰ This is unacceptable. Residential ratepayers would be responsible for coming up with an additional \$700 to pay to Bloom,²¹ and the amounts would be much higher for large commercial and industrial customers. However expensive Bloom has turned out to be, requiring ratepayers to come up with large sums of cash to pay Bloom off could very well increase Delmarva’s uncollectible accounts receivable. Four to five dollars a month over time is easier to cover than \$700 immediately.

D. The Proper Forum for Nichols’ Petition is in a Delaware Court

15. Delaware law also mandates the following:

Notwithstanding § 201 of [Title 26] or any other provision of the Delaware Code to the contrary, the courts of this State shall have exclusive original jurisdiction over any dispute between a qualified fuel cell provider project and a commission-regulated electric company involving the interpretation of the obligations between them as contained in Commission approved tariffs required by [26 Del. C. § 364(d)].²²

²⁰ To his credit, Mr. Nichols recognizes that Bloom would expect some payment for this. (Petition at 7)..

²¹ See footnote 1.

²² 26 Del. C. §364(i).

Thus, a Delaware court - not this Commission - has the legal authority and exclusive jurisdiction to hear any disputes involving an interpretation of Bloom's or Delmarva's obligations under the Tariff. The Commission may not exploit an "end run" to assist Nichols with his requested "optional" remedies. The law clearly states that enacting modifications to the Tariff would require an interpretation of the provisions of the Tariff. If an interpretation is required, then a Delaware court must make such a ruling. The Petition is therefore outside the purview of the Commission's jurisdiction, and the Commission should dismiss it with prejudice.

CONCLUSION

16. Staff and the DPA are sympathetic to the concerns expressed in Mr. Nichols' petition. But that sympathy cannot allow this Commission to ignore Delaware law. Because Delaware law clearly restricts the Commission from engaging in any attempt to modify the provisions of the approved Tariff, whether directly or indirectly, and creates an enforceable revenue property for Bloom that is enforceable with the guaranty of the State of Delaware, and because only a court of law may interpret the provisions of the Tariff as between Delmarva and Bloom, the Commission has no choice but to dismiss the Petition.

WHEREFORE, based on the argument and authorities set forth above, Staff and the DPA respectfully request that the Commission deny the Petition and dismiss it with prejudice.

Respectfully submitted,

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